A Brief Survey of the Development of the Adversary System

STEPHAN LANDSMAN*

I. INTRODUCTION

Since approximately the time of the American Revolution, courts in the United States have employed a system of procedure that depends upon a neutral and passive fact finder (either judge or jury) to resolve disputes on the basis of information provided by contending parties during formal proceedings. This dispute-resolving mechanism is most frequently termed "the adversary system." Whether to continue relying upon the adversary system has become a subject of intense debate in the United States. Champions of change, from the Chief Justice of the United States Supreme Court to the American Bar Association Commission on Evaluation of Professional Standards (the Kutak Commission), have challenged adversarial principles and proposed an array of reforms. Chief Justice Burger has suggested that the various elements of the adversary system deny justice to litigants, impair faith in the courts, and raise the specter of a "breakdown" of the judicial machinery.[1] He has suggested substantial modification of the system to deal with these problems.[2] The American Bar Association Commission shares Chief Justice Burger's concerns. In its Model Rules of Professional Conduct, first presented in January 1980, it proposed revisions of the lawyer's code of ethics designed to substantially reduce the adversarial nature of attorney behavior.[3]

The adversary system and its constituent parts are taken for granted in America today. The implications of reliance on an adversarial mechanism have been consid-

---

* Professor, Cleveland-Marshall College of Law. A.B., 1969, Kenyon College; J.D., 1972, Harvard Law School. This article is dedicated to two outstanding members of the faculty of the Ohio State University College of Law, Associate Professor Louis Jacobs and Professor Lawrence Herman. Their friendship and support sustained the author during trying times. The author wishes to acknowledge the financial assistance of the American Enterprise Institute (A.E.I.). This article is adapted from a section of a larger work to be published by A.E.I. under the title "The Adversary System: A Description and Defense." Finally, the author wishes to thank W. S. Moore and Ann Stuart Diamond of A.E.I. for their advice and assistance.

1. *See* Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 236 (1973) (vast majority of attorneys are incapable of "effective trial advocacy"); Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855, 858 (1971) (attack on jury trial in civil cases); Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 932 (1970) (adversary system crippled by delay); Burger, *For Whom the Bell Tolls*, 36 VT. SPEECHES DAY 322 (1970) (appellate procedure costly and futile); McDonald, *A Center Report/ Criminal Justice*, CENTER MAG., Nov. 1968, at 69, 69 (quoting remarks of then United States Court of Appeals Judge Warren Burger) ("The American system, up to the time of the final verdict and appeal, puts all the emphasis on techniques, devices, mechanisms. It is the most elaborate system ever devised by a society. It is so elaborate that in many places it is breaking down. It is not working.")

2. *See supra* note 1.

3. *See* MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980). For a discussion of the changes proposed, see Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in that System*, 18 SAN DIEGO L. REV. 251 (1981) (of special significance are proposed Rule 1.5, which undercuts the traditional adversarial notion of attorney zeal on behalf of a client, and proposed Rule 3.1, which sharply increases the requirement of attorney candor toward a tribunal).

ered only infrequently.[4] One way to improve our understanding of the system is by reviewing the history of its development: this review can assist in identifying the values the system was intended to serve and the methods by which various procedures came to be incorporated into that system. Unfortunately, legal historians have not focused their attention on the development of the adversary system.[5] Not even the date or the manner of its establishment has been authoritatively fixed. This Article will attempt, through the use of secondary sources,[6] to delineate approximately when adversarial procedure came into use and to relate its rise to contemporaneous social and political events. It is hoped that the insights gained in this effort will help clarify the aims and worth of adversary procedure.

II. The Adversary System Defined

The first step in the historical quest is to define the meaning of the term "adversary system." Adversary procedure should not be viewed as a single technique or collection of techniques; it is a unified concept that works by the use of a number of interconnecting procedures, each of real importance to the process as a whole. The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.[7]

Like any brief definition of a complex subject, the foregoing description of the adversary system fails to indicate some of the most important principles and practices inherent in adversary methodology. To present an accurate picture, the key elements in the system—utilization of a neutral and passive fact finder, reliance on party presentation of evidence, and use of highly structured forensic procedure—must be described more fully. This additional information will be particularly helpful in determining when the adversary system became a fully integrated entity.

A. *Neutral and Passive Fact Finder*

The adversary system relies on a neutral and passive decision maker to adjudicate disputes that have been aired by the adversaries in a contested proceeding. He is

---

4. The following books and articles are among the few in recent American legal literature to consider the nature of the adversary system: J. Frank, Courts on Trial (1949); W. Glaser, Pretrial Discovery and the Adversary System (1968); J. Thibaut & L. Walker, Procedural Justice: A Psychological Analysis (1975); Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. Rev. 516 (1976); Fuller, *The Adversary System*, in Talks On American Law 30 (H. Berman ed. 1971); Millar, *The Formative Principles of Civil Procedure—I*, 18 Ill. L. Rev. 1 (1923); Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 Va. L. Rev. 1 (1978).

5. *See* Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 263–64 (1978).

6. As Langbein indicates, the primary sources fundamental to a detailed understanding of the history of the development of the adversary system are only now beginning to be explored. Langbein, *supra* note 5, at 263–72. In light of this problem, and because the secondary sources cited hereinafter provide materials from which a serviceable historical framework can be fashioned, secondary sources will be relied upon throughout this Article. However, the author is mindful that complete reliance on secondary literature, because of the selectivity of the authors, can lead to serious distortions. *See* Berman, Book Review, 91 Yale L.J. 383, 386–90 (1981) (reviewing M. Shapiro, Courts: A Comparative and Political Analysis (1981)). To minimize this danger, historical propositions will be premised, whenever possible, upon the works of several authors writing from divergent perspectives.

7. Much of this definitional section is drawn from the author's article, Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 Buffalo L. Rev. 487 (1980).

expected to refrain from making any judgments until the conclusion of the contest and is prohibited from becoming actively involved in the gathering of evidence or in the parties' settlement of the case. Adversary theory suggests that if the decision maker strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence.[8]

Adversary theory further suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society that the judicial system is trustworthy; when a decision maker becomes an active questioner or otherwise participates in a case, society is likely to perceive him as partisan rather than neutral.[9] Judicial passivity thus helps to ensure the appearance of fairness.[10]

B. *Party Presentation of Evidence*

Intimately connected with the requirements of decision-maker passivity and neutrality is the procedural principle that the parties are responsible for production of all the evidence upon which the decision will be based.[11] This principle insulates the fact finder from involvement in the contest. It also encourages the adversaries to find and present their most persuasive evidence and, therefore, affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof. Moreover, it focuses the litigation upon the questions of greatest importance to the parties, thereby increasing the likelihood of a decision tailored to their needs.[12]

---

8. Herein the term "passivity" will be defined as a significant degree of judicial deference to the parties in the management and presentation of litigated questions. However, it is not intended to connote the quiescence of a "well-behaved child, [who] speaks only when spoken to," Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 41 (H. Berman ed. 1971). The requirement that fact finders be both passive and neutral frequently has been viewed as fundamental to the adversary system. *See* C. CURTIS, IT'S YOUR LAW 1, 82 (1954); W. GLASER, *supra* note 4, at 3–4; J. THIBAUT & L. WALKER, *supra* note 4, at 22–23; Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160–61 (1958); Millar, *The Formative Principles of Civil Procedure—I*, 18 ILL. L. REV. 1, 16–19 (1923); Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 13 (1978). *But see* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2551 (Chadbourn rev. 1981) (asserting that passivity was an historical accident imposed on the judiciary because of the enmity of the 18th and 19th century electorate); Langbein, *supra* note 5, at 284–300 (remarking the long-standing English tradition of judicial activism that endured at least until the middle of the 18th century).

Active inquiry has frequently been identified as a threat to neutrality. *See, e.g.*, W. GLASER, *supra* note 4, at 4; Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decision-Making*, 86 HARV. L. REV. 386 (1972).

9. *See* W. GLASER, *supra* note 4, at 5; J. THIBAUT & L. WALKER, *supra* note 4, at 68; *see also* Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

10. One implication of insistence on decision-maker neutrality and passivity is that it favors the use of lay juries rather than professional judges. Judges, who are constantly called upon to make rulings and otherwise direct the contest, become deeply involved in the management of lawsuits. Their passivity and neutrality are likely to be strained as they perform these functions. *See, e.g.*, Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465 (1976). Except in cases of unusual notoriety, juries are unlikely to face similar strains. Further, the corporate nature of the jury, the availability of *voir dire*, and the use of peremptory challenges help to insure a level of jury neutrality that cannot be assured when an individual judge sits as fact finder. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); D. LOUISELL & H. WILLIAMS, THE PARENCHYMA OF LAW 57–58 (1960); Powell, *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 7 (1966).

11. *See* M. CAPPELLETTI & J. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION 247–48 (1975); J. THIBAUT & L. WALKER, *supra* note 4, at 23; Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1090–91 (1975); Millar, *The Formative Principles of Civil Procedure—I*, 18 ILL. L. REV. 1, 18 (1923).

12. The benefit of this approach may be measured in economic terms because litigant control reduces "impositional costs" (*i.e.*, those related to the imposition of an unbargained for and poorly tailored resolution). *See* Lea & Walker, *Efficient Procedure*, 57 N.C.L. REV. 361, 376 (1979).

Because of the potential complexity of legal questions and the intricacy of the legal mechanism, parties generally cannot manage their own lawsuits. Rather, they, and the adversary system, have come to rely upon a class of skilled professional advocates to assemble and present the testimony upon which decisions will be based. The advocates are expected to provide the legal skills necessary to organize the evidence and formulate the issues.[13]

C. *Highly Structured Forensic Procedure*

Elaborate sets of rules to govern the pretrial and post-trial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics) are all important to the adversary system. Rules of procedure produce a climactic confrontation between the parties in a single trial session or set of trial sessions.[14] This confrontation yields the evidence upon which the decision will be based and diminishes the opportunity for the fact finder to undertake a potentially biasing independent investigation.[15]

The evidence rules protect the integrity of the testimonial segment of adversary proceedings. They prohibit the use of evidence that is likely to be unreliable and thereby insulate the trier from misleading information.[16] These rules also prohibit the use of evidence that poses a serious threat of exciting unfair prejudice against one of the parties.[17] By strict enforcement of this prohibition, the adversary system seeks to preserve the neutrality and passivity of the decision maker. Moreover, rules of evidence enhance the power of the attorney to control the fact-presentation process by providing her with a precisely formulated set of principles for determining the admissibility of each piece of evidence. Thus the rules confine the authority of the judge to manage the proceedings:[18] judges are not free to pick and choose the evidence they think most appropriate, but are bound to obey the previously fixed evidentiary prescripts.

Because the highly competitive nature of adversary procedure may tend to promote a win-at-any-cost attitude, the adversary system employs a set of ethical rules to control the behavior of counsel.[19] To ensure the integrity of the process, tactics designed to harass or intimidate an opponent, as well as those intended to

13. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 31–33 (1972); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); Powell v. Alabama, 287 U.S. 45, 68–69 (1932); W. GLASER, *supra* note 4, at 15.

14. *See* M. CAPPELLETTI & J. JOLOWICZ, *supra* note 11, at 246–48; Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 841 (1971).

15. *See supra* note 14.

16. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 2 (1898); Goodhart, *A Changing Approach to the Law of Evidence*, 51 VA. L. REV. 759, 760–61 (1965); Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1015–16 (1978); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 989–90 (1973) [hereinafter cited as Saltzburg, *Harmless Error*].

17. *See* J. THAYER, *supra* note 16, at 266; Thibaut, Walker & Lind, *supra* note 8, at 387 n.4.

18. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 134–36 (1973); Langbein, *supra* note 5, at 306.

19. *See* W. GLASER, *supra* note 4, at 6–7; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1037 (1975).

mislead or prejudice the trier of fact, are forbidden.[20] In addition, the rules of ethics are designed to promote vigorous adversarial contests by requiring that each attorney zealously represent his client's interests at all times. To ensure zeal, the ethical rules require attorneys to give their clients undivided loyalty.[21]

Reliance on elaborate sets of rules to structure the adversary process has led to the establishment of courts of appeals, which ensure that litigants and judges comply with mandated procedures.[22] Appellate judges review the records of trial proceedings and determine whether the various legal prescriptions have been obeyed. If error is found, the appellate courts are empowered to redress the harm done. Appellate review also encourages attorneys and judges at the trial level to adhere to the requirements of the law in order to avoid reversal on appeal.[23]

III. The Rise of the Adversary System

A. *Medieval Procedure*

The adversary method of resolving disputes did not appear, fully formed, at a precise moment in history. Rather, it is a product of the slow evolution of English and American judicial procedure. To understand how the adversary system arose, one must go back at least to the eleventh century and examine the ancient precursors to present-day judicial practice.

1. *Trial by Battle*

The forensic clash of the parties in the adversary system seems so like combat that it is tempting to suggest that the real source of the adversary process was the ancient mode of dispute resolution referred to as trial by battle.[24] However, this proposition is not supported by historical evidence.

Trial by battle was a means of settling conflicts that required the disputants or their champions to engage in physical combat until one side yielded (by speaking the word "craven"), was decisively defeated, or, in certain serious criminal matters, was slain. The battle was overseen by judicial officers and was commenced after each of the combatants had taken a solemn oath that his cause was just, had invoked the judgment of God, and had declared that he did not use sorcery or enchantment.[25]

---

20. *See, e.g.*, Model Code of Professional Responsibility DR 7-102(A)(1) (harrassment), DR 7-102(A)(2)-(6) (use of false evidence), DR 7-102(B) (fraud), DR 7-105(A) (threat of criminal prosecution), DR 7-106(B) (disclosure of legal authority) (1979).

21. *See* Model Code of Professional Responsibility Canons 4-7 & DRs 4-101 to 7-110; M. Cappelletti & J. Jolowicz, *supra* note 11, at 240-41.

22. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. Cal. L. Rev. 901, 910 (1971); Rosenberg, *Devising Procedures that Are Civil to Promote Justice that Is Civilized*, 69 Mich. L. Rev. 797, 803 (1971).

23. *See* R. Traynor, The Riddle of Harmless Error 50, 80-81 (1970); Saltzburg, *Harmless Error*, *supra* note 16, at 1014 n.89.

24. *See, e.g.*, Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y. L. F. 123, 135 (1974).

25. This description of trial by battle is based upon Blackstone's Commentaries, *see* 3 W. Blackstone, Commentaries *338-41; 4 W. Blackstone, Commentaries *341, 342, *reprinted in* 1 W. Holdsworth, A History of English Law 678-79 (7th ed. 1956); *see also* T. Plucknett, A Concise History of the Common Law 116-17 (5th ed. 1956); 1 W. Holdsworth, *supra*, at 308-09.

Trial by battle was in common use throughout most of northern Europe in the early Middle Ages. However, it was not employed in England until after the Norman conquest in 1066.[26] Its late introduction into Britain, its Norman sponsorship, its potentially drastic consequences, and its bias in favor of the rich, who either had martial skills or could hire those with such skills, have led most commentators to surmise that it was never a very popular or influential form of adjudication in England.[27]

2. *Alternatives to Battle*

Battle was but one of several alternatives available in the medieval English courts.[28] The two most important alternative means of resolving disputes were wager of law and ordeal. Wager of law required that one of the litigants swear a precisely prescribed oath that his claims were true and produce a certain number of other persons, usually referred to as compurgators, to support his oath by making their own oaths.[29] If all was performed properly, the oath taker won his case. The wager of law has been described by Plucknett as a "character test" in which the oath taker established his case by demonstrating his good standing in the community.[30]

The ordeal was a form of adjudication popular throughout medieval Europe. It was premised upon the idea that God would intervene and by miraculous sign indicate whether the litigant undergoing the ordeal was in the right. A priest usually administered an oath before the ordeal, and, quite frequently, the ordeal was conducted on church grounds.[31] Plucknett indicates that in England the primary forms of ordeal required the litigant to carry a red-hot iron bar, place an arm in boiling water, or be immersed in deep water. In the first two instances, if the litigant's burns did not fester after a prescribed period he was held to be in the right. In the latter case, success was achieved if the litigant sank briefly rather than floated.[32]

3. *Common Elements*

In most cases more than one form of trial might be applicable, and a crucial function of the medieval court was to decide which method to employ. Usually, this decision was made after the plaintiff had orally stated his claim to the court and had supported it with logically persuasive evidence or, more often, oaths from individuals not directly involved in the litigation. The defendant was limited to a single defense: denial of the plaintiff's claim. Based upon these preliminary proceedings, the court would enter a "medial judgment" fixing the form of trial and designating the party

---

26. *See* 1 W. HOLDSWORTH, *supra* note 25, at 308. *But see* T. PLUCKNETT, *supra* note 25, at 116 (noting the possibility that trial by battle might have been known in Danelaw in the 10th century).

27. *See* J. THAYER, *supra* note 16, at 40–42 (discussing the views of early commentators).

28. *See* 1 W. HOLDSWORTH, *supra* note 25, at 299–312; T. PLUCKNETT, *supra* note 25, at 113–19.

29. *See* 1 W. HOLDSWORTH, *supra* note 25, at 305–08; T. PLUCKNETT, *supra* note 25, at 115–16; J. THAYER, *supra* note 16, at 24–34.

30. T. PLUCKNETT, *supra* note 25, at 115.

31. *Id.* at 114.

32. *Id.*

required to make the proof.[33] Being permitted to make the proof was generally considered an advantage (especially in cases of wager of law and in those ordeals in which success was likely).[34] The outcome of the wager, ordeal, or battle was the exclusive basis upon which the dispute was resolved.[35]

4. *Relationship to Adversary Process*

All the medieval methods of trial were premised upon divine intervention. Direct heavenly intercession was postulated for ordeal and battle, and eternal damnation was supposed to enforce the oath-taking mechanism.[36] Emphasis was clearly on the judgment of God rather than that of man.[37] Accordingly, the system made very little use of evidence, the process was not orally contentious, and fact-finding was unnecessary because no facts were to be deduced from evidence. Activity in the courts was, to an overwhelming degree, carried on by the parties rather than by advocates, and the advocate's role was limited.[38] Because of reliance on divine revelation, there was very little development of appellate process.

It may safely be asserted that none of the medieval methods was even remotely adversarial. Further, an examination of subsequent history suggests that medieval practices did not serve as the intellectual or procedural basis upon which adversarial principles were eventually built.[39]

However, the medieval forms of procedure did contribute to the formulation of adversarial concepts in at least two ways. First, they helped to establish the principle that the parties to a dispute should play the preeminent part in the procedure leading to its resolution.[40] This idea of active party participation is fundamental to the adversary system and has been continuously present in English law from the medieval period onward. Second, medieval practice circumscribed the part to be played by judicial officials.[41] Although judges would eventually gain a far more central role in

---

33. *See* 1 W. HOLDSWORTH, *supra* note 25, at 299–302.

34. *See id.* at 311 (noting that Maitland could find only one case between 1201 and 1219 in which the accused was convicted by ordeal); 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 107 (1923) ("The person who successfully made the proof was the person who won his case. The chance of so doing was a valuable right. Proof was a benefit, not a burden." (footnote omitted)). *But see* J. THAYER, *supra* note 16, at 10 (indicating that in some circumstances making the proof could be "very dangerous and burdensome").

35. *See* 1 W. HOLDSWORTH, *supra* note 25, at 301.

36. *See* J. THAYER, *supra* note 16, at 9–10 (the various ancient modes of trial "call for the direct intervention of the divine justice"); Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 439 (1935) ("The religious element permeated every method of proof.")

37. However, it should be kept in mind that the medial judgment procedure "was influenced by rational considerations as to probabilities of the truth of the contentions of the parties to the litigation." 1 W. HOLDSWORTH, *supra* note 25, at 301–02 (footnote omitted).

38. *See* R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 77 (1953) ("[a]dvocacy was not needed in the era of the old mechanical trials of Anglo-Saxon law"); 1 W. HOLDSWORTH, *supra* note 25, at 299 ("the parties tried their own cases"). The absence of advocates is to be distinguished from reliance on champions who would frequently fight on behalf of litigants required to do battle. *See* 1 W. HOLDSWORTH, *supra* note 25, at 309.

39. *See infra* subparts III(B)–(E).

40. *See* 1 W. HOLDSWORTH, *supra* note 25, at 299.

41. *See* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 280–81 (1926):

> We have seen that it was an old principle that it was the business of the court, which was trying an action, merely to see that the law adjective and substantive was observed by the litigants. The strict rules of law determined the rights of the litigants; and its administrators were passive agents—umpires—set there to see that

resolving disputes, the early restraints on judicial activity at least helped to establish a tradition restrictive of the scope of judicial control over litigation.

By the middle of the thirteenth century, all the medieval modes of procedure had been either banned or seriously criticized. In 1215 the Fourth Lateran Council prohibited church participation in trial by ordeal.[42] This prohibition effectively ended the practice because priestly participation had been one of its fundamental components. At about the same time, canon and lay critics began a sustained attack on wager of law and trial by battle. The decline of the medieval methods led to the development of a variety of new judicial practices. These practices, developed largely between the thirteenth and seventeenth centuries, formed the foundation upon which the adversary system was erected in the eighteenth and nineteenth centuries.

B. *The Rise of the Jury*

Without doubt the most important new practice was the use of the jury as a means of resolving disputes in English courts. The origins of the jury have not been authoritatively established. Most historians suggest a Carolingian genesis,[43] while some others suggest an Anglo-Danish beginning.[44] However it originally arose, by the end of the twelfth century the jury had been incorporated into the English judicial process.[45] Its acceptance at that time can be linked to the decline of the medieval forms of procedure: as ordeal, battle, and wager shrank in significance, trial by jury expanded to replace them.[46]

1. *The Beginning of Trial by Jury*

It is suggested by both Holdsworth and Plucknett that criminal and civil jury practice evolved along separate though related lines during their formative period from the end of the twelfth century to the middle of the fifteenth century.[47] On the criminal side, the first kind of jury to appear was the jury of presentment, or grand jury. This jury consisted of a group of prominent citizens called together at royal insistence to report on the misdeeds of local citizens and to prepare indictments for the prosecution of accused malefactors.[48] In the early days indicted defendants were

---

the law was observed by both parties, and that the final decision was arrived at, and executed, in accordance therewith.

Id. (footnote omitted); *see also* J. THAYER, *supra* note 16, at 198.

42. *See* J. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 134–36 (1974) [hereinafter cited as J. LANGBEIN, PROSECUTING CRIME]; T. PLUCKNETT, *supra* note 25, at 118–19; Ploscowe, *supra* note 36, at 447.

43. Plucknett, for example, points to France during the reign of Louis the Pious around 829 A.D. as a likely location and date for the initiation of the jury concept. *See* T. PLUCKNETT, *supra* note 25, at 109–10; *see also* 1 W. HOLDSWORTH, *supra* note 25, at 312–13; J. THAYER, *supra* note 16, at 48.

44. For a discussion of the Anglo-Danish jury theory, see T. PLUCKNETT, *supra* note 25, at 108–09 & 109 n.1.

45. *See id.* at 111–13; J. THAYER, *supra* note 16, at 47–84.

46. *See* J. LANGBEIN, TORTURE AND THE LAW OF PROOF 77–78 (1977); 1 W. HOLDSWORTH, *supra* note 25, at 311; J. THAYER, *supra* note 16, at 41.

47. *See* 1 W. HOLDSWORTH, *supra* note 25, at 321–32; T. PLUCKNETT, *supra* note 25, at 107.

48. *See* 1 W. HOLDSWORTH, *supra* note 25, at 321–23; T. PLUCKNETT, *supra* note 25, at 112–13 (it was the Assize of Clarendon in 1166 A.D. that firmly established the criminal presentment system).

tried either by ordeal or by wager of law.[49] When ordeal and wager fell into disuse, the judiciary naturally gravitated toward the use of a second jury (often containing members of the original presentment jury) to decide the question of guilt or innocence.[50] Although criminal jury procedure varied considerably during the thirteenth and fourteenth centuries, eventually the size of the trial jury came to be fixed at twelve men.[51] From the earliest times the procedure required that the jurors be drawn from the neighborhood in which the crime had taken place.[52]

On the civil side, Henry II, in the late part of the twelfth century, introduced the assize as a means of settling certain disputes concerning the ownership of land.[53] Like the criminal jury, the assize was composed of a group of prominent citizens drawn from the community in which the dispute arose. Members were selected by the King's officers and were charged with the responsibility of deciding disputes on the basis of their personal knowledge.[54] Gradually, these groups came to be used to resolve conflicts other than those concerning the ownership of land. The popularity of this form of adjudication led to its ever expanding use, and it eventually became the preferred procedure in almost every civil cause of action.[55]

The early juries were not the neutral and passive fact finders that they eventually became when incorporated within the adversary framework. At first the jury procedure was little more than another formal and inscrutable trial like ordeal and wager of law.[56] In its early days, the jury heard no evidence and rendered its decision on no

---

49. Holdsworth notes,

> At the end of the twelfth century a person appealed, i.e. accused of crime by a private person, could get by payment the right to be tried by a jury. His strict right was to prove his innocence by one of the orthodox ways—by battle, compurgation, or ordeal. Similarly, if a person was presented by a grand jury as suspected he must clear himself either by compurgation or ordeal—not by battle because there could be no battle when the crown was the accuser.

1 W. HOLDSWORTH, *supra* note 25, at 323 (footnotes omitted).

50. *See* 1 W. HOLDSWORTH, *supra* note 25, at 323–27; T. PLUCKNETT, *supra* note 25, at 120–27; Wells, *The Origin of the Petty Jury*, 27 LAW Q. REV. 347, 348–61 (1911), *reprinted in* J. SMITH, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 190–93 (1965).

51. *See* 1 W. HOLDSWORTH *supra* note 25, at 324–25.

52. Holdsworth explains this procedure as follows:

> The jury was a body of neighbors called in, either by express law, or by the consent of the parties, to decide disputed questions of fact. The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge. For this reason it has been said that the primitive jury were witnesses to rather than judges of the facts. They were in a sense witnesses. But they were more than witnesses. They were a method of proof which the parties were either obliged or had agreed to accept. It was the easier so to regard them, because they represented the sense of the community—hundred or shire—from which they were drawn; and in the days when such communities had each its court, when individuals lived more simple and more similar lives, the sense of the community was a thing more distinctly realized.

Id. at 317 (footnotes omitted); *see also* T. PLUCKNETT, *supra* note 25, at 127; J. THAYER, *supra* note 16, at 90–94.

53. T. PLUCKNETT, *supra* note 25, at 111.

54. This description is based upon 1 W. HOLDSWORTH, *supra* note 25, at 327–29. *See also* T. PLUCKNETT, *supra* note 25, at 111; POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 241–43 (A. Kiralfy 4th ed. 1962), *reprinted in* S. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 121–23 (1966).

55. *See* 1 W. HOLDSWORTH, *supra* note 25, at 331; J. THAYER, *supra* note 16, at 66–68.

56. *See* 1 W. HOLDSWORTH, *supra* note 25, at 317; J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 132–33 (quoting T. PLUCKNETT, EDWARD I AND CRIMINAL LAW 75 (1960)); T. PLUCKNETT, *supra* note 25, at 125. *But see* J. SMITH, *supra* note 50, at 196 ("Use of the jury did not constitute a mechanical test like ordeal or compurgation or battle; it involved utilization of a body of rational and intelligent persons sworn to 'well and truly try and true deliverance make between the king and prisoner at the bar.'")

rational basis. Apparently, divine guidance was relied upon to produce the proper result. Yet, even in its earliest forms, the jury was an improvement over the medieval methods of proof. Jurors were selected from the locality in which the dispute arose and almost always included among their number some persons with knowledge of the events that were the focus of the litigation. Furthermore, when the jury mechanism matured, jurors were allowed as much as two weeks notice before trial and, during the period between notice and trial, were allowed to "certify themselves" of the facts in dispute by talking to the litigants and making private inquiries in the community.[57] This tended to insure that jurors would be, to some degree, informed of the facts in issue and, therefore, likely to make a reasoned decision.

The use of jurors from the neighborhood of the dispute and reliance upon each juror's personal knowledge marked early jury procedure as inquisitorial rather than adversarial. The jury did not act as a neutral and passive fact finder, but rather as an active and inquiring body searching for material truth. The inquisitorial elements in jury procedure were long-lived in both England and the United States. In 1670 an English court held, in *Bushell's Case*,[58] that jurors were free to reject the evidence presented in court and base their decision on private knowledge.[59] Furthermore, it was not until 1705 in civil cases and 1826 in criminal cases that jurors could be drawn from places other than the immediate locality in which the dispute arose.[60] To this day, the grand jury functions as an inquisitorial body seeking evidence upon which to premise criminal indictments.[61]

Although the jury was not by its nature adversarial, certain of its procedures and much of its early development paved the way for the growth of adversary process. During the period from 1300 to 1500 the jury developed many of the characteristics that would result in its becoming a neutral and passive adjudicator. By the middle of the 1300s, prospective jurors could be challenged by the parties and potentially biased jurors removed from the panel.[62] Toward the end of the 1300s or in the early part of the 1400s, contacts between litigants and jurors after the submission of a case were significantly curtailed, reducing the possibility of prejudice.[63] By 1470 Fortes-

---

57. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 622–28 (2d ed. 1898), *reprinted in* S. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 123–26 (1966); J. SMITH, *supra* note 50, at 219.

58. 124 Eng. Rep. 1006 (C.P. 1670). Bushell's Case was a habeas corpus proceeding brought to free a juror who had been imprisoned for refusing to pay a fine imposed by the trial judge when he and his fellow jurors declined to convict Quakers William Penn and William Mead of trespass, contempt, and unlawful assembly. Chief Justice Vaughan held, *inter alia*, that it was illegal to punish uncorrupted jurors for their verdict. One of the reasons he advanced in support of this holding was that jurors might have private knowledge of facts that were unknown to the trial judge but warranted the result reached. *Id.* at 1012; *see* 1 W. HOLDSWORTH, *supra* note 25, at 344–47; T. PLUCKNETT, *supra* note 25, at 134; J. THAYER, *supra* note 16, at 166–69; Langbein, *supra* note 5, at 298 n.105.

59. Langbein argues persuasively that Bushell's Case was "wilfully anachronistic" in basing its result "upon the self-informing character of the jury." Langbein, *supra* note 5, at 298 n.105.

60. *See* 1 W. HOLDSWORTH, *supra* note 25, at 332.

61. The presentment jury was, from the earliest times, an "inquisitory" body. *See id.* at 312–13; T. PLUCKNETT, *supra* note 25, at 123. The modern grand jury has retained this inquisitorial cast. *See* 1 W. HOLDSWORTH, *supra* note 25, at 322–23; Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1020 (1974).

62. *See* 1 W. HOLDSWORTH, *supra* note 25, at 324–25, 336–37; T. PLUCKNETT, *supra* note 25, at 433–34; J. SMITH, *supra* note 50, at 196.

63. *See* J. THAYER, *supra* note 16, at 110–11.

cue, in his famous volume, *In Praise of the Laws of England*,[64] was able to describe jurors as impartial men who came to court with open minds.[65]

Although jurors could, perhaps as late as 1670, rely upon their private knowledge in reaching decisions,[66] from at least the fifteenth century onward jurors began to rely upon what was presented in court as the basis for their decision. Sources of in-court information included the arguments of counsel (often treated as the equivalent of testimony given under oath) and the testimony of witnesses.[67] The use of a considerable volume of evidence had the effect of subtly shifting the function of the jury from active inquiry to passive review and analysis.[68]

2. *Independence from Governmental Control*

As the jury became more passive, it gained freedom from governmental control. The juries assembled by the King's representatives in the twelfth and thirteenth centuries were quite clearly subordinate to the government. They were specially selected by royal officials for the purpose of answering questions propounded on behalf of the King.[69] Eventually, however, the jury became an independent entity unconnected with the objectives of government. This change was undoubtedly facilitated by the increasingly neutral and passive functioning of the jury: as an active inquirer the jury played the role of a law enforcer, but as a neutral and passive fact finder it was not suited for this role. Arguably, by 1670 the jury had become an independent agency capable of resisting government direction or control. Fundamental to the realization of this independence was the ruling in *Bushell's Case*.[70] There, Chief Justice Vaughan rejected the idea that the judiciary could control juries by the imposition of sanctions.[71]

The growing neutrality, passivity, and independence of the jury had the effect of loosening the government's political hold on the judiciary. Because the presence of an independent jury relieved the judges of responsibility for unpopular or politically inexpedient decisions, the jury insulated judges from political criticism and allowed them to develop a more evenhanded approach toward the litigants.[72]

---

64. J. FORTESCUE, DE LAUDIBUS LEGUM ANGLIE (S. Chrimes trans. 1942).

65. *Id.* at 57, 59.

66. *See* 1 W. HOLDSWORTH, *supra* note 25, at 333–34; J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 118–24.

67. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267, 275 (1974).

68. *See* 1 W. HOLDSWORTH, *supra* note 25, at 332–37; T. PLUCKNETT, *supra* note 25, at 132–33.

69. *See* 1 W. HOLDSWORTH, *supra* note 25, at 312–16; T. PLUCKNETT, *supra* note 25, at 120–21; R. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 173–76 (1959), *reprinted in* S. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 87–88 (1966).

70. *See supra* note 58.

71. Plucknett suggests that evidence of the political independence of the jury may be found as early as 1544 when a jury refused to convict Throckmorton despite clear evidence of his involvement in Wyatt's rebellion. T. PLUCKNETT, *supra* note 25, at 133–34.

72. *See* 1 W. HOLDSWORTH, *supra* note 25, at 318 n.3 ("Roper, in his life of More, tells us that More said of the judges, 'They see, that they may, by the verdict of the jury, cast off all quarrels from themselves upon them, which they account their chief defence.'"); *see also id.* at 348.

3. *The Jury as a Bulwark Against Inquisitorial Procedure*

The rise of the jury not only laid the groundwork for adversary procedure, but also served to inhibit the development of inquisitorial process in England. When the Fourth Lateran Council, in 1215, banned church participation in ordeals, the vacuum created by this edict (and by the related decline of wager of law and trial by battle) was filled in England by jury trial. On the Continent a very different form of procedure was adopted. This procedure, the Roman-canon system, was the product of combining certain aspects of the law of ancient Rome with judicial principles developed in European ecclesiastical circles.[73] By the sixteenth century this amalgamation of the Roman and canon approaches was dominant throughout virtually all of continental Europe.[74]

The Roman-canon system placed fundamental emphasis on active inquiry by the judge to uncover truth. He was charged with the duty of investigating the case, gathering the proof, and rendering the decision.[75] He was obviously the central figure in the litigation and his actions determined the outcome. The scope of the judge's power was so extensive (and such a radical departure from the ordeal, which purported to rely on the judgment of God) that it was thought prudent to limit his authority by means of strict evidentiary requirements.[76] Under these evidentiary strictures, the judge could convict a criminal defendant in only two circumstances: when two eyewitnesses were produced who had observed the gravamen of the crime, or when the defendant confessed. Circumstantial evidence was never sufficient in itself to warrant conviction. These evidentiary rules made it impossible to obtain convictions in many cases unless the defendant was willing to confess. Roman-canon process authorized the use of torture to extract the necessary confessions. Thus, torture became a tool of judicial inquiry and was used to generate the evidence upon which the defendant would be condemned.[77]

Rather than adopt the Roman-canon approach, the English elected to rely upon the jury. By so doing Britain rejected the straitjacketing evidentiary rules of the ecclesiastical courts, the active and inquiring judicial officer, and the use of torture to obtain confessions. The existence of the jury made England resistant to Roman-canon ideas and thereby opened English courts at an early date to a broad spectrum of evidence to be assessed by an increasingly neutral and passive fact finder.[78] The English chose to utilize an existing form of procedure to meet the needs of society. They thereby maintained traditional protections and avoided the adoption of a new and, in significant ways, oppressive alternative.

C. *Development of Pre-Adversarial Legal Institutions Between 1200 and 1700*

During the era between the thirteenth and seventeenth centuries a number of legal institutions underwent changes that paved the way for adversarial procedure.

---

73. *See* J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 129–39.
74. *Id.*
75. *See id.* at 131.
76. *See* J. LANGBEIN, TORTURE AND THE LAW OF PROOF 5–8, 56–57 (1977).
77. *Id.* at 4–5.
78. *See supra* note 46.

Lawyers rose to prominence both as advocates and as judicial officers. At around the beginning of the 1300s requirements were established regulating the education and conduct of those who would be allowed to argue cases in the King's courts.[79] In time, the advocates formed special organizations, called the Inns of Court, for the training and governance of the bar. The Inns produced lawyers highly skilled in court procedure and disputation.[80] These men formed the nucleus of a legal profession that would eventually assert exclusive control over the judicial machinery.

1. *Lawyers*

As the jury's investigative role diminished, the advocates' trial responsibilities in civil cases increased. Lawyers undertook the job of supplying the jury with the evidence upon which decisions would be based. By 1600 lawyers had established their special status as masters of the evidentiary process.[81] One recognition of this status was the adoption, around 1577, of the concept of attorney-client privilege,[82] which granted lawyers a special exemption from the obligation to provide evidence when the evidence had been provided to them by their clients. Although the privilege was first premised upon the dignity of the attorney,[83] the rule clearly facilitated the lawyer's freewheeling search for evidence by insulating him from compulsion to disclose information obtained from his client. Seldom could anyone else claim such protection.

2. *Judges*

Lawyers came to dominate not only the advocacy process, but the judiciary as well. By the thirteenth century, English law and procedure had become sufficiently technical to warrant the designation of full-time judges. At first, the judges were drawn from among the King's retainers—men who functioned as civil servants and traced their allegiance directly to the sovereign.[84] But, by the close of the thirteenth century, the legal profession had wrested control of the judiciary away from civil servants.[85] After 1300 judges were appointed only from among the ranks of serjeants, a small group that constituted the elite of the bar.[86] This placed the judiciary firmly in the hands of lawyers and linked judicial concerns to advocate interests.

The professionalization of the judiciary led to increasingly complex law and procedure. Technicality had the effect of isolating the judges and their work from the rest of the government.[87] While this isolation was eventually to have negative consequences (a rigid preoccupation with form and excessive tolerance of delay), it did

79. *See* 2 W. HOLDSWORTH, *supra* note 34, at 484–85; T. PLUCKNETT, *supra* note 25, at 217–23 (Writ of 1292 established a system for the education of "attorneys and learners").

80. *See* 2 W. HOLDSWORTH, *supra* note 34, at 493–512.

81. *See id.* at 484; Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267, 279 (1974).

82. *See* 9 W. HOLDSWORTH, *supra* note 41, at 201–03.

83. *Id.*

84. *See* T. PLUCKNETT, *supra* note 25, at 234–38.

85. *See* 2 W. HOLDSWORTH, *supra* note 34, at 285; T. PLUCKNETT, *supra* note 25, at 238–39.

86. *See* 2 W. HOLDSWORTH, *supra* note 34, at 485–93; T. PLUCKNETT, *supra* note 25, at 238–39.

87. *See* T. PLUCKNETT, *supra* note 25, at 157–59.

foster judicial independence.[88] Reliance on a small group of elite judges also had the effect of inhibiting the establishment of any sizeable judicial bureaucracy. The existence of such a bureaucracy in several European countries had facilitated the adoption of methods dependent on extensive judicial inquiry rather than party presentation;[89] its absence in England made inquisitorial methods impractical.[90]

3. *Witnesses*

The transformation of the jury and the legal profession was accompanied by important changes in the English attitude toward witnesses and the value of their testimony. Through the fifteenth century the testimony of witnesses was held in low esteem: voluntary testimony was viewed with suspicion, and witnesses could not be compelled to testify against their will.[91] In the sixteenth century the presentation of testimonial evidence grew dramatically. By the middle of that century, justices of the peace had been charged, pursuant to the Marian statutes of 1554–1555,[92] with the duty of securing evidence and testimony in criminal proceedings.[93] This information generally came to replace private juror inquiry as the basis of decision in criminal cases.[94] In the period between 1555 and 1565 a second development, the enactment of legislation allowing courts to compel witnesses to testify,[95] helped to alter English attitudes toward witnesses. This legislation placed a stamp of approval on oral testimony as a source of information for the increasingly passive and uninformed jury. Both developments helped open the way to adversarial evidentiary procedure by shifting attention from each juror's private knowledge toward witness testimony given in open court.

4. *Rules of Evidence*

To facilitate the evaluation of testimonial and other evidence, the English courts, after the enactment of the Marian statutes, accelerated their efforts to fashion rules of evidence. The judiciary developed rules prohibiting the use of certain types of misleading and untrustworthy material (*e.g.*, the testimony of proven perjurers).[96] Other types of protective rules were also advanced, including limitations upon the use of a wife's testimony against her husband.[97] At the same time, previously established

---

88. *Id.*

89. *See* J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 221–22.

90. *See id.* at 121; Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 448 (1935).

91. *See* 1 W. HOLDSWORTH, *supra* note 25, at 333–36; 9 W. HOLDSWORTH, *supra* note 41, at 177–83.

92. *See generally* J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 5–20.

93. *See id.* at 118–24; T. PLUCKNETT, *supra* note 25, at 170.

94. *See* J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 119–20.

95. *See* 9 W. HOLDSWORTH, *supra* note 41, at 185 (the statute of Elizabeth that created civil compulsory process also established the statutory offense of perjury); T. PLUCKNETT, *supra* note 25, at 436 (statutory compulsion came first in criminal cases pursuant to the second act of Philip and Mary, 2 & 3 Phil. & M., ch. 10 (1555); the landmark statute regarding witness compulsion in civil cases came shortly thereafter, 5 Eliz., ch. 9, sched. 6 (1563)).

96. *See* J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 123–24; *see generally* 9 W. HOLDSWORTH, *supra* note 41, at 189–97 (these prohibitions were created to deal not only with perjurers but also with nonbelievers and persons with a stake in the litigation).

97. *See* J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 123.

evidentiary rules were being refined, including the best evidence rule,[98] the opinion rule,[99] and the hearsay rule.[100] Even within the categories they addressed, these rules did not prohibit the introduction of all misleading evidence, nor did they seriously address the problem of prejudicial evidence that might distract the jurors from their task.[101] However, the rules did demonstrate the growing judicial awareness of evidence problems and open the way for the creation of a full set of adversarial rules of evidence in the eighteenth and nineteenth centuries.

5. *Adversarial Shortcomings of Procedure Before 1700*

The legal mechanism developed between the thirteenth and seventeenth centuries provided the foundation upon which adversarial process was built, but judicial activity during this period was not truly adversarial. In 1565 Sir Thomas Smith, in *De Republica Anglorum*,[102] provided a description of the typical criminal felony trial of his day.[103] According to Smith, the trial began with the defendant's being brought before the court and asked how he pleaded. Almost invariably the defendant entered a formal plea that he be tried by jury.[104] Local citizens were then called one at a time and seated as members of the jury unless the defendant objected to their participation in the case. After twelve jurors had been seated they were sworn and the hearing was commenced.[105]

Usually, the case was prosecuted by a justice of the peace who began his presentation by reading from a written account of his interrogations of the accused and various witnesses.[106] Next, the victim and other witnesses were produced and questioned. The questioning was initiated by the judge, and questions were put to the defendant as well as the witnesses. The questioning usually led to a freewheeling discussion (or, in Smith's word, "altercation") between the witnesses, defendant, and judge.[107] When the judge was satisfied that he had heard enough he called an end

---

98. *See* 9 W. HOLDSWORTH, *supra* note 41, at 170–77; 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1177 (Chadbourn rev. 1972).

99. *See* 9 W. HOLDSWORTH, *supra* note 41, at 211–14; 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1917 (Chadbourn rev. 1978).

100. *See* 9 W. HOLDSWORTH, *supra* note 41, at 214–19; 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364 (Chadbourn rev. 1974).

101. *See supra* notes 98–100; *see also* 9 W. HOLDSWORTH, *supra* note 41, at 127; Langbein, *supra* note 5, at 300–06.

102. T. SMITH, DE REPUBLICA ANGLORUM (L. Alston ed. 1906).

103. *Id.* at 94–104. Holdsworth, Langbein, Plucknett, and Thayer all rely on Smith's description. *See* 9 W. HOLDSWORTH, *supra* note 41, at 225; J. LANGBEIN, PROSECUTING CRIME, *supra* note 42, at 29–31; T. PLUCKNETT, *supra* note 25, at 434; J. THAYER, *supra* note 16, at 157 n.4.

104. Those who refused to plead voluntarily were almost invariably compelled to do so by severe methods ("*peine forte et dure*"), including being put in irons, denied food and drink, and even pressed to the point of death. *See* 1 W. HOLDSWORTH, *supra* note 25, at 326–27; J. LANGBEIN, TORTURE AND THE LAW OF PROOF 74–77 (1977); T. PLUCKNETT, *supra* note 25, at 125–26.

105. T. SMITH, *supra* note 102, at 98.

106. *Id.* at 99.

107. *Id.* at 99–100. Smith describes the "altercation" as follows:

> The Judge first after they be swome, asketh first the partie robbed, if he knowe the prisoner, and biddeth him looke upon him: he saith yea, the prisoner sometime saith nay. The partie pursuivaunt giveth good ensignes *verbi gratia*, I knowe thee well ynough, thou robbedst me in such a place, thou beatest mee, thou tookest my horse from mee, and my purse, thou hadst then such a coate and such a man in thy companie: the theefe will say

to the altercation, summarized the case for the jury, and charged them to decide it.[108] Frequently, the jury was asked to hear evidence in two or three cases before retiring to deliberate.[109] Once the jury had retired, its members were not allowed to eat or drink until a decision had been rendered.[110]

Criminal procedure in Smith's day differed appreciably from truly adversarial process. The judge was clearly an active inquirer (perhaps even prosecutor) rather than a neutral arbiter. The defendant was not represented by counsel and, indeed, was specifically prohibited from having legal representation. The defendant was not allowed to call witnesses, conduct any real cross-examination, or develop an affirmative case. All sorts of evidence could be used in the proceedings, including potentially misleading and prejudicial material such as the out-of-court statements read by the justice of the peace. Although the jury was ostensibly neutral and passive, its deliberations were likely to be influenced by the judge's remarks and instructions.[111] The judge was free to urge a verdict upon the jury and, up until 1670, jurors who refused to follow the judge's directions could be jailed or fined.[112] Finally, there was no appellate procedure by which the litigants could secure review of the decision.[113] While the germ of adversarial process may be seen in these proceedings—because they were orally contentious, decided upon the evidence of witnesses, and judged by an arguably neutral and passive jury—they cannot be classified as truly adversarial.

---

no, and so they stand a wile in altercation, then he telleth al that he can say: after him likewise all those who were at the apprehension of the prisoner, or who can give any *indices* or tokens which we call in our language evidence against the malefactor. When the Judge hath heard them say inough, he asketh if they can say any more: if they say no, then he turneth his speeche to the enquest.

Id.

108. *Id.* at 99.

109. *Id.*

110. *Id.* at 101.

111. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 63 (1973) (trials in early days of American colonies were "status degradation ceremonies").

Pound notes,

Seventeenth-century judges were expected by the king to be active in the prosecutions tried before them and were not unlikely to lose their positions if they did not procure convictions in political cases. The accused could not be represented by counsel, except to present certain points of law, and the forensic manners of the king's judges and king's lawyers were vigorous often to the extent of brutality.

R. POUND, CRIMINAL JUSTICE IN AMERICA 100 (1930).

J. Stephen describes the defendant's plight as follows:

(1) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defence. He was examined and his examination was taken down. (2) He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced on his trial. He had no counsel either before or at the trial. (3) At the trial there were no rules of evidence, as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced. (4) The confessions of accomplices were not only admitted against each other, but were regarded as specially cogent evidence. (5) It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he did or not, as he had no means of ascertaining what evidence they would give, or of procuring their attendance. In later times they were not examined on oath, if they were called.

1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883) (footnote omitted), *reprinted in* T. PLUCKNETT, *supra* note 25, at 434; *see also* 9 W. HOLDSWORTH, *supra* note 41, at 223–24; Langbein, *supra* note 5, at 282 (no *voir dire*, opening, or closing were allowed).

112. *See supra* note 58 and accompanying text.

113. *See* 1 W. HOLDSWORTH, *supra* note 25, at 346–47; J. LANGBEIN, TORTURE AND THE LAW OF PROOF 80 (1977); T. PLUCKNETT, *supra* note 25, at 213; J. THAYER, *supra* note 16, at 138–40.

The courtroom routine in civil litigation was more adversarial in the sixteenth and seventeenth centuries than its criminal counterpart.[114] However, even in civil cases the emphasis was not upon adversarial presentation of evidence. Rather, lawyers devoted most of their energy to the fabrication and presentation of pleadings designed to reduce the case to a single, certain, and material question of fact.[115] To arrive at this tightly constricted jury question, counsel were compelled by the rules of procedure to ever more narrowly refine their claims by means of a series of writs, motions, and court rulings.[116] At first this winnowing process was conducted before the courts at oral hearings, but in the latter part of the fifteenth century the pleading process came to be based primarily on written materials.[117] The legal papers involved were measured by the most exacting technical standards and were treated as the most important facet of the case.[118]

The development of legal principles, not the discovery of evidence upon which to resolve disputes between litigants, was of central concern to the bench and bar during this era. The system was not truly adversarial because it dramatically shifted the focus away from resolving factual disputes by the examination of evidence presented in open court. It was a system designed to satisfy an astonishing array of formal rules rather than to address the substance of the parties' claims, and it confined the proof-presenting process to the narrowest corner of judicial activity. Additionally, as in criminal proceedings, the judge was a very active participant, the protection against misleading or prejudicial evidence was minimal, and appellate review was seldom available. The only way jury action could be reviewed was by means of attaint, a quasi-criminal prosecution of the jurors.[119] This mechanism was woefully inadequate to correct any but the grossest errors or misdeeds.[120] Further, when review was available it was premised on a record that generally did not include the trial proceedings.[121] In sum, there was seldom an effective means of appealing adverse factual determinations or breaches of the rules governing trial.

Finally, the period between the fifteenth and seventeenth centuries saw the establishment of certain judicial mechanisms fundamentally at odds with adversary

---

114. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 627–53 (1923) (describing the plea system); Arnold, *Law and Fact in Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267, 274–75 (1974) (describing the activity of counsel in trespass and other sorts of cases through the fifteenth century).

115. *See* 9 W. HOLDSWORTH, *supra* note 41, at 245–46, 279–80.

116. *Id.* at 264–79.

117. *See* 3 W. HOLDSWORTH, *supra* note 114, at 640–53.

118. *Id.* at 615–16, 629; 9 W. HOLDSWORTH, *supra* note 41, at 245–46.

119. Plucknett explains,

> [Attaint] consisted in summoning a jury of twenty-four, and the proceedings were not merely a reconsideration of the facts in dispute, but also a criminal trial of the first jury for perjury. This was only logical at a time when every jury spoke out of its own knowledge of the facts involved in the case. Their function was to tell upon oath the facts which they knew; it was not their duty to act as impartial judges of evidence produced before them. If such jurymen returned a verdict which was demonstrably false, and in spite of their own better knowledge of the facts, then it was obvious that they had committed perjury and deserved the punishment provided for attained juries.

T. PLUCKNETT, *supra* note 25, at 131. *See also* 1 W. HOLDSWORTH, *supra* note 25, at 337–42.

120. *See* T. PLUCKNETT, *supra* note 25, at 133.

121. *See* R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 44 (1941) (the record included only "the writ, the pleadings, the recital of the trial, the verdict and proceedings after verdict and the judgment").

principles. Most important among these was the Star Chamber, created in the late 1400s to decide noncapital criminal cases (especially those of a political nature) and to punish misbehaving jurors.[122] Star Chamber practice was based upon the judicial examination of witnesses *in camera*. Cases were frequently commenced with secret judicial examination of the defendant under oath. Thereafter other witnesses were called and privately examined, and, at the end of the questioning, records of the examinations were used as the basis for the court's decision.[123] In the procedures of the Star Chamber can be seen the spirit of an era that had not yet adopted adversary principles. The legislation dismantling the Star Chamber in the 1640s, while motivated by the politics of the time, may be taken as the announcement of a change in English sensibilities and a turning toward adversarial principles.[124]

D. *The Establishment of the Adversary System*

Political turmoil engulfed England in the second half of the seventeenth century and triggered dramatic reforms.[125] From the 1640s onward the full range of adversarial mechanisms began to grow, and by the end of the 1700s the adversary system had become firmly established not only in England but also in America.

1. *Judge and Jury Become Neutral and Passive*

During this period, both judge and jury came to conform fairly closely to the ideals of neutrality and passivity. The jury was placed firmly on the road to neutrality by *Bushell's Case* in 1670, which freed it from judicial sanctions.[126] Although that case left jurors free to use their own knowledge, the notion of active jury inquiry was on the wane well before 1670 and rapidly declined thereafter.[127] By 1700 decisions rendered at *nisi prius* could be reversed and a new trial ordered if the judge believed the evidence was insufficient to warrant the verdict.[128] The availability of a new trial in these circumstances bespeaks judicial confidence that the great bulk of the evidence was being heard in open court rather than in private. This new trial mechanism was effectively extended to all cases by Lord Mansfield after 1756.[129] Juror activism was also curbed in other ways during the eighteenth century. Of special importance is the abolition in civil cases, after 1705, of the requirement that jurors be drawn from the exact neighborhood in which the case arose.[130] This substantially reduced the

122. *See* G. ELTON, THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 159, 161–62, 167–68, 169–71 (1960), *reprinted in* J. SMITH, *supra* note 50, at 327–30; T. PLUCKNETT, *supra* note 25, at 181–84.

123. *See* Barnes, *Due Process and Slow Process in the Late Elizabethan—Early Stuart Star Chamber*, 6 AM. J. LEGAL HIST. 221, 227–31 (1962).

124. *See* 9 W. HOLDSWORTH, *supra* note 41, at 229–36; T. PLUCKNETT, *supra* note 25, at 191–93.

125. *See* 9 W. HOLDSWORTH, *supra* note 41, at 230; T. PLUCKNETT, *supra* note 25, at 48–64.

126. *See supra* note 58 and accompanying text.

127. *See supra* note 59 and accompanying text.

128. *See* 1 W. HOLDSWORTH, *supra* note 25, at 225; T. PLUCKNETT, *supra* note 25, at 135 (citing Lord Holt's opinion in Argent v. Darrell, 91 Eng. Rep. 551 (K.B. 1700)); J. THAYER, *supra* note 16, at 169–70.

129. *See* 1 W. HOLDSWORTH, *supra* note 25, at 225–26; T. PLUCKNETT, *supra* note 25, at 135–36 (citing Lord Mansfield's opinion in Bright v. Eynon, 97 Eng. Rep. 365 (K.B. 1757)).

130. *See supra* note 60 and accompanying text.

likelihood that jurors would have any private information to utilize in making their decisions.

By the eighteenth century the jury was viewed not only as a neutral and passive fact finder, but also as a fundamental check on governmental and judicial despotism. Cases like the famous New York trial of John Peter Zenger on charges of seditious libel in 1734[131] and *Bushell's Case* illustrate this trend. In both cases jurors resisted government efforts to use the judicial mechanism as a means of punishing political opponents.[132] It is not surprising that when the Constitution of the United States was fashioned in the 1780s it specifically incorporated the right to jury trial as a check on the other institutions of government.[133]

Judicial neutrality and passivity took a longer time to develop. In England the struggle between the principles of royal prerogative and impartial adjudication raged throughout the seventeenth century. The reign of the Stuart Kings was marked by repeated royal attempts to manipulate the judiciary and by the removal of judges for political reasons.[134] It was not until 1701, when Parliament passed the Act of Settlement, that judges were assured tenure during good behavior.[135] At around the same time, Lord Holt became Chief Justice of the King's Bench and significantly altered judicial attitudes toward criminal defendants, prompting the courts to recognize an obligation to protect defendants and ensure fair trials.[136] The rise of judicial in-

---

131. *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654–55 & 655 n.48 (1973).

132. In Zenger's trial,

> [w]hile the trial itself was a criminal case, the popular imagination could probably still recall that one of the articles for which Zenger had been prosecuted was a strong denunciation of Governor Cosby of New York for attempting to recover a debt in equity court in order to evade the debtor's right to a jury trial in the common-law courts.

Id. (footnote omitted). For a description of the situation in Bushell's Case, see *supra* note 58.

133. *See* W. NELSON, AMERICANIZATION OF THE COMMON LAW 96–97 (1975):

> Prerevolutionary ideas about the importance of the jury system to liberty also remained dominant. For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights; as one historian has noted, it was the only right universally secured by the first American state constitutions. In fact, the Massachusetts constitution, after making provisions for trial by jury in both civil and criminal cases, further provided that "this method of procedure shall be held sacred . . . ." And when the federal Constitution failed some seven years later to provide for "trial[s by jury] as free and impartial as the lot of humanity will admit of," its failure provoked a storm of criticism in the Massachusetts ratifying convention. To Americans of the revolutionary generation, in short, "the right . . . of a free subject . . . of an opportunity of being acquitted . . . by a verdict of his peers, & of vindicating his innocency & establishing his good name in the fact of the Country" was a vital one.

Id. (footnote omitted); *see also* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 171–72 (1964).

134. *See* 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 416, 648 (1938); T. PLUCKNETT, *supra* note 25, at 49–53 (The most famous clash between king and judiciary came in 1616 when James I removed Chief Justice Coke from office because of the latter's dissenting opinion in Colt & Glover v. Bishop of Coventry & Lichfield (Case of the Commendams), 80 Eng. Rep. 290 (K.B. 1612).); J. SMITH, *supra* note 50, at 342–43; J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603–1689, 38–40 (1961), *reprinted in* J. SMITH, *supra* note 50, at 390–91.

135. Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701); *see* 10 W. HOLDSWORTH, *supra* note 134, at 416, 644; T. PLUCKNETT, *supra* note 25, at 60; Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 469 n.90 (1935).

136. *See* 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 518–19 (1924); T. PLUCKNETT, *supra* note 25, at 245–47.

dependence and the application of evenhandedness in criminal cases together set the courts firmly on the road to judicial neutrality.

In the United States the struggle for judicial neutrality was played out primarily in the early 1800s. Until then judges were apt to be political partisans who openly advertised their attitudes in court.[137] After Jefferson was elected, his supporters attempted to remove a number of incompetent or partisan Federalist judges from office by means of impeachment and conviction.[138] In 1804 John Pickering was removed in this manner and, shortly thereafter, Supreme Court Justice Samuel Chase was impeached. After a turbulent trial, Chase was acquitted by a single vote in the Senate. Chase's prosecution served as a powerful warning against strident political activity by judges, and the neutral posture adopted by Supreme Court Chief Justice John Marshall became the standard by which to measure the propriety of judicial behavior.[139] After 1800 tighter controls were also imposed upon the courtroom activity of American judges. Judicial conduct was controlled by applying strict rules of evidence and by placing exacting limits on the sorts of remarks that could be made at the close of the case.[140] These two developments—adoption of a neutral political stance and placement of tighter controls on courtroom activity—moved American judges toward neutrality and passivity.

2. *Expansion of the Role of the Bar*

While judges and juries were evolving into neutral and passive fact finders, the legal profession grew significantly in strength and importance. In England, counsel came to have a decisive part to play in the criminal process as well as in the civil process. Defendants accused of treason were allowed attorneys in 1695, and lawyers were given widening responsibility in felony cases throughout the 1700s.[141] By 1837 felony defendants were allowed attorneys for all purposes in British courts.[142]

The English bar had been highly skilled and well established even before the eighteenth century. Its position was simply enhanced during the 1700s. In the United States, however, the bar had not been so well placed, and its growth during this period was impressive. Professor Lawrence Friedman suggests that in 1700 America had few attorneys but that by 1750 virtually every major American community had a competent and successful bar.[143] This pattern of growth continued throughout the succeeding two centuries, most spectacularly after 1850.[144] As the number and authority of attorneys increased, so apparently did the vigor of their advocacy. By the

137. *See* L. FRIEDMAN, *supra* note 111, at 113; R. POUND, CRIMINAL JUSTICE IN AMERICA 153–54 (1930).

138. For a description of the efforts to remove Federalist judges, see L. FRIEDMAN, *supra* note 111, at 114–16.

139. *Id.* at 116.

140. *Id.* at 350 (law of evidence designed to keep judges in check); Note, *supra* note 133, at 186–89 (development of rules intended to restrict judicial comment to juries).

141. *See* 9 W. HOLDSWORTH, *supra* note 41, at 235; T. PLUCKNETT, *supra* note 25, at 435; Langbein, *supra* note 5, at 307–14.

142. *See* 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 157 (1965).

143. L. FRIEDMAN, *supra* note 111, at 81–84; *see also* W. NELSON, AMERICANIZATION OF THE COMMON LAW 70 (1975) (dramatic increase in percentage of lawyers serving as judges on Massachusetts Supreme Judicial Court between 1760 and 1800).

144. *See* L. FRIEDMAN, *supra* note 111, at 549–50.

first half of the nineteenth century flamboyant courtroom advocacy was the main avenue to success.[145] Lawyers rose to prominence because of their forensic skills, and this aspect of the attorney's work took on paramount importance.

3. *Establishment of Modern Rules of Procedure and Evidence*

The expansion of attorneys' responsibilities as purveyors of evidence and managers of litigation was facilitated by changes in the rules of evidence and procedure. Changes in procedure introduced during the eighteenth and nineteenth centuries shifted legal focus away from elaborate pleadings and debates about fine points of law toward resolution of disputes on the merits. Lord Mansfield, one of those primarily responsible for reform, worked to reduce the use of the rules of procedure as a device for avoiding adjudication on the merits. He fashioned simpler rules when possible and sought to persuade litigants to voluntarily consent to the use of streamlined practices.[146] The reforms begun by Mansfield were carried forward by both English and American legislatures: throughout the nineteenth century the legislatures acted to reduce the technicality and complexity of the legal process. Among the outstanding achievements of this legislative effort were the Field Code adopted by New York in 1848[147] and the Judicature Acts adopted by the English Parliament in 1852 and 1873.[148] The result of these reforms was the freeing of advocates to devote their energies to the resolution of disputes by the presentation of evidence in open court.

With the growth in importance of courtroom presentation came heightened sensitivity to evidentiary problems. The law of evidence developed in two directions during the 1700s and 1800s. First, rules were shaped that increased the availability of evidence. Proscriptions incapacitating various witnesses were overthrown. Parties to litigation, for several centuries, had been barred from testifying, but after repeated attacks by Jeremy Bentham and others, the rule of party incapacity was abandoned. (The English law on this question was revised in 1851.)[149] Even earlier, Mansfield had taken the lead in overturning other witness disqualifications, including those concerning non-Christians, Quakers (who refused to take an oath), and nonparty witnesses who were in some way interested in the outcome of the litigation.[150] In

---

145. *See id.* at 270–75.

146. *See* 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 493–503 (1938).

147. *See* L. FRIEDMAN, *supra* note 111, at 340–41.

148. *See* 1 W. HOLDSWORTH, *supra* note 25, at 633–47; 15 W. HOLDSWORTH, *supra* note 142, at 102–18.

149. Holdsworth explains,

> But the fallacies which underlay it were exposed by Bentham, and were brought to the notice of the public by Denman and Brougham. The result was that, during the nineteenth century, the disqualification of persons interested and parties was gradually got rid of both in civil and criminal cases. In the cases of parties and interested persons the Legislature has at length grasped the truth which had, in the case of some of the other disqualifications, been grasped at an earlier date—that interest in the result of the litigation is a valid objection, not to the competence of the witness, but to the weight of his evidence.

9 W. HOLDSWORTH, *supra* note 41, at 196 (footnotes omitted); *see also* 15 W. HOLDSWORTH, *supra* note 142, at 139; W. NELSON, AMERICANIZATION OF THE COMMON LAW 113–14 (1975) (detailing the earlier Massachusetts movement to do away with a variety of witness incapacity rules). The trend that led to the termination of these incompetencies has swept so far in the twentieth century that almost every sort of witness will be heard. *See* Kaplan, *Mason Ladd and Interesting Cases*, 66 IOWA L. REV. 931, 951 (1981).

150. *See* 12 W. HOLDSWORTH, *supra* note 146, at 508–09.

addition, judicial authority to compel testimony was enhanced during this period. In 1804 English common-law courts were given the power to require, by writ of *habeas corpus ad testificandum*, the appearance of virtually any witness.[151] And in 1806 witness refusal to answer questions on the ground that response might lead to civil liability was outlawed.[152] The combined effect of these changes was to open the courts to the testimony of nearly every witness and to increase the burden on the trier of fact to sift and analyze conflicting testimony.

The second development in the law of evidence during this period was the expansion of rules designed to safeguard the neutrality and passivity of the fact finder. Included were regulations intended to insulate the decision maker from misleading or prejudicial material and regulations designed to prevent the trial judge from taking too active a part in the prosecution of the case. Fundamental in the effort to insure the integrity of the evidence was an emphasis on cross-examination.[153] Attorneys were encouraged to test almost every piece of evidence by rigorous cross-examination, and when evidence, such as out-of-court affidavits, could not be tested in this way, rules were established to bar use of the evidence in most circumstances.[154] Exclusionary rules were fashioned not only to ensure cross-examination, but also to prevent the use of questionable materials. The opinion and hearsay rules were refined to achieve this objective.[155] Moreover, when the newly expanded rules of evidence were violated, reversal and retrial could be expected. This enforcement of the rules, coupled with limitations on judicial questioning and comment, helped to curtail judicial activism. The rules of evidence developed during this period provided a framework within which a truly adversarial contest could be conducted.

4. *Development of a Code of Legal Ethics*

The regulation of the practice of law had begun long before the eighteenth century; rules governing advocates were already common in the thirteenth century.[156] However, an adversarial code emphasizing zealous representation of each client and loyalty to his cause was the product of the eighteenth and nineteenth centuries.[157] As

---

151. *See* 13 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 407 (1952).

152. *Id.*

153. *See* 9 W. HOLDSWORTH, *supra* note 41, at 218–19, 230; 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 522 (1938); Langbein, *supra* note 5, at 311–14.

154. *See* 9 W. HOLDSWORTH, *supra* note 41, at 218–19; 11 W. HOLDSWORTH, *supra* note 153, at 522–23. *But see* 12 W. HOLDSWORTH, *supra* note 146, at 507 (this period also saw the development of certain exceptions to the hearsay rule).

155. Friedman notes,

> [Between 1776 and the 1830s] many rules of evidence received classic formulation. The rules were heavily influenced by the jury system, and the attitude of the law toward the jury. In medieval times, the jury had been a panel of neighbors—knowing busy-bodies, who perhaps had personal knowledge of the case. When the function of the jury changed to that of an impartial panel of listeners, the law of evidence underwent explosive growth. The rules began to exclude all shaky, secondhand, or improper evidence from the eyes and ears of the jury. Only the most tested, predigested matter was fit for the jury's consumption. Consequently, in the 19th century, the so-called *hearsay rule* became one of the dominant rules of the law of evidence.

L. FRIEDMAN, *supra* note 111, at 135–36; *see also* 9 W. HOLDSWORTH, *supra* note 41, at 212 (opinion rule), 217–19 (hearsay rule).

156. *See* 2 W. HOLDSWORTH, *supra* note 34, at 310–18, 484; T. PLUCKNETT, *supra* note 25, at 219.

157. *See generally* Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in that System*, 18 SAN DIEGO L. REV. 251 (1981).

proceedings became more adversarial, conflicting ethical demands were exerted upon lawyers.[158] On the one hand, attorneys were expected to be officers of the court and seek the truth. On the other, they were expected to be keen advocates on behalf of their clients.

These conflicting duties were highlighted in a series of hotly contested late eighteenth and early nineteenth century British trials. One of the most famous was the prosecution of Queen Caroline for adultery in 1821.[159] During the course of the proceedings, the Queen's attorney, Lord Brougham, declared that regardless of personal and political risk he had but a single duty—to zealously represent his client.[160] While this doctrine of single-minded zeal was never officially adopted, it became a fundamental tenet of the adversary lawyer's code.[161] In America, Judge George Sharswood, in a series of lectures given in 1854 at the University of Pennsylvania, delineated a set of ethical precepts that placed primary emphasis on zeal and loyalty[162] and later served as the model for the American canons of professional conduct.[163] Serving as a counterbalance to the principle of zealous representation is a series of rules curtailing sharp practices, forbidding tactics designed to harass or intimidate an opponent, and barring behavior intended to mislead or prejudice the fact finder.[164]

5. *Appellate Review*

The final component of the adversary system to take shape during the eighteenth and nineteenth centuries was appellate review. Until the 1700s, there was little review of trial proceedings.[165] Thereafter, the new trial and bill of exceptions mechanisms grew to maturity and provided a sound basis for review.[166] Coupled with this expansion of appeals was the development in the nineteenth century of courts that did nothing but decide appellate cases.[167] These courts were committed to a careful

---

158. This was especially true when lawyers became more frequently involved in criminal cases. *See supra* notes 141–42.

159. 2 TRIAL OF QUEEN CAROLINE 1 (F. Linn ed. 1879); *see also* D. MELINKOFF, THE CONSCIENCE OF A LAWYER 188–89 (1973).

160. 2 TRIAL OF QUEEN CAROLINE 3 (F. Linn ed. 1879).

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

Id.

161. *See* Landsman, *supra* note 157, at 254.

162. G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1860).

163. *See* Landsman, *supra* note 157, at 255.

164. *See supra* note 20.

165. *See supra* notes 119–21 and accompanying text.

166. *See supra* notes 128–29 and accompanying text; 1 W. HOLDSWORTH, *supra* note 25, at 223–24 (bill of exceptions).

167. *See* L. FRIEDMAN, *supra* note 111, at 122–24; 1 W. HOLDSWORTH, *supra* note 25, at 643; *see also* Surrency, *The Development of the Appellate Function: The Pennsylvania Experience*, 20 AM. J. LEGAL HIST. 173, 173 (1976):

> The clear distinction between review and trial functions developed predominantly during the nineteenth century. In the eighteenth and earlier centuries, the English courts, after which American courts were generally patterned, had exercised both trial and appellate functions without clearly delineating between the two. During the early decades of the nineteenth century, American courts experimented with a variety of methods, the most

search of the record to determine if error warranting reversal had occurred. The emphasis on the search for error may have played a part in leading nineteenth century courts to a preoccupation with technical nicety.

While the precise reasons for appellate technicality in the nineteenth century are not known,[168] the development of adversarial principles may have been its catalyst. When appellate courts began to see themselves as guardians of a system with precise rules concerning evidence, procedure, passivity, and neutrality, they may have concluded that strict enforcement by means of reversal was the only way to ensure compliance with the new principles. And old habits may have died hard in the lower courts, causing the appellate judges to be even more vigorous in their review. Whatever the cause of strict review, it did help to establish the adversarial principle that trial activity must conform to the rules vesting the litigants with control of the process and securing the neutrality and passivity of the fact finder.

E. *Reasons for the Development of the Adversary System*

Although it is not clear why adversary process came into its own during the eighteenth and nineteenth centuries, a variety of social and economic considerations may have influenced its development. The 1700s and 1800s were a time of intense social and economic ferment. They were the centuries of the American and French revolutions and of dramatic industrialization. The traditional bases of wealth and power in English society—real property and aristocratic position—were steadily undermined by growing profits from trade and manufacture.[169] Those who profited in the new industries swelled the ranks of the middle class, and as this class grew in size and strength, its champions[170] argued that fundamental changes should be made in the organization of society.[171] Among the changes sought was a significant extension

---

commonly used of which was the new trial, or a trial *de nova*, in attempting to correct the errors of inferior trial courts. These attempts formed an evolutionary process, out of which there eventually emerged a judicial structure which separated the trial and appellate functions while simultaneously defining both of them.

Id.

168. *See* L. FRIEDMAN, *supra* note 111, at 348–50; *see also* R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 35–36 (1941); R. POUND, CRIMINAL JUSTICE IN AMERICA 160–64 (1930). (Pound, in both the preceding works, decries the "record-workship" and technicality of the appellate courts of the nineteenth century.)

169. *See* L. FRIEDMAN, *supra* note 111, at 99–100, 297–98 (from the Revolution onward American law became increasingly concerned with middle class interests); 10 W. HOLDSWORTH, *supra* note 134, at 21; T. PLUCKNETT, *supra* note 25, at 67–70, 200 (during the eighteenth and nineteenth centuries the middle class rose to power in England and the law became increasingly concerned with questions of commerce and industry); Duman, *A Social and Occupational Analysis of the English Judiciary: 1770–1790 and 1855–1875*, 17 AM. J. LEGAL HIST. 353, 356–57 (1973) (number of judges from the landed classes shrank drastically between 1770 and 1875, and the sons of professionals and merchants became dominant within the ranks of the judiciary).

170. Important spokesmen of the middle class point of view included Adam Smith, Jeremy Bentham, and Lord Brougham. *See* 11 W. HOLDSWORTH, *supra* note 153, at 501–18 (Smith's views and influence); T. PLUCKNETT, *supra* note 25, at 73–74 (Bentham's thought and impact); 13 W. HOLDSWORTH, *supra* note 151, at 41–81 (Bentham's thought and impact); 13 W. HOLDSWORTH, *supra* note 151, at 195–200 (Brougham's life and works).

171. Holdsworth neatly summarizes the position and impact of these thinkers:

> All these ideas had begun to influence public opinion in England at the end of the eighteenth and the beginning of the nineteenth centuries. Though they had produced little practical effect during the war years, many of them had exerted an increasing influence after 1815, and had produced the reforms in the law needed to give effect to them before 1832. The fact that the Whig victory in 1831 accelerated their reception and more especially the movement for reform in all branches of the law, was due primarily to the Reform Act which gave

of the franchise. The democratization of the electorate achieved during this era had the effect of accelerating the shift of power from the landed gentry to urban, energetic, nonaristocratic groups.

The forces that sought voting rights also pressed for expansion of individual political and economic freedoms. The freedoms of speech, assembly, and petition were all vigorously asserted and given wider recognition.[172] On the economic scene, freedom was associated with the dissolution of social restraints on wages, prices, and profits.[173] It was also associated with the principle of freedom of contract, which allows each person the right to enter into whatever agreements he thinks proper.[174] Economic competition and social change rather than stability became the hallmarks of society.[175] The disappearance of the old restraints released forces that transformed society. Those who could function effectively in the market place, like the entrepreneurs and the business corporations, grew in prominence, while individual laborers faced greater privation and suffering than they had ever known before.[176]

The demise of stability led to a new legal situation. The numbers and types of disputes that were brought to the courts grew significantly.[177] Amidst all the conflict and change, it is likely that a desire arose for a legal mechanism that could meet the problems of the day and yet preserve some continuity with the more stable past. The adversary mechanism met these requirements. It was an outgrowth of procedures that had been used for several hundred years in England and America. The idea of a

---

a greatly increased Parliamentary influence to their supporters. But it was also due in part to the fact that James Mill had reduced the new political economic and legal ideas of Bentham and Ricardo to an ethical and philosophic system. That system which is known as "philosophic radicalism" was a compact body of doctrine which put all these new ideas on a philosophic basis. Its leaders advocated democratic principles, and they justified these principles on grounds which were more rational, though hardly less questionable, than Rousseau's and Paine's theories of natural rights. They reduced the new economic ideas to so rigid and logical a system that the injustices caused by the attempt to apply it rigidly had begun to excite opposition. They advocated wholesale reforms of the legal system by means of the Legislature in order to give effect to the many detailed deductions which Bentham had drawn from his principle of utility.

13 W. HOLDSWORTH, *supra* note 151, at 5 (footnotes omitted).

172. *See* 10 W. HOLDSWORTH, *supra* note 134, at 672–705 (reviewing rights of "liberty of discussion," "petition," and "public meeting" in England in late eighteenth and early nineteenth centuries); W. NELSON, AMERICANIZATION OF THE COMMON LAW 89–116 (1975) (describing heightened concern with liberty in post-revolutionary America).

173. *See* W. NELSON, *supra* note 172, at 143.

The shift in the philosophy of contract was merely one part, however, of a broader shift in men's understanding of the role of law in the economy. In the prerevolutionary period the function of law had been to render the distribution of wealth stable by granting individuals property rights in the wealth and by making it difficult for them to lose it in exchange transactions. After the Revolution property ceased to be viewed as a man's stable portion of the community's resources. Instead, his property became his starting stake in a rapidly changing economy—which he could use as he wished, by combining with other entrepreneurs or by making sharp bargains so as to promote his own aggrandizement. Massachusetts, in short, had been transformed from a society where men with stable places in the economy concentrated on pursuing ethical ends to a society where economic place was uncertain and many men used their wealth chiefly for the purpose of acquiring even greater wealth. The prerevolutionary legal system, in which community was the primary social value, had largely been destroyed. A new system emphasizing rugged individualism as its fundamental value had begun to take its place.

Id.; *see also* 11 W. HOLDSWORTH, *supra* note 153, at 390–94, 462–75.

174. *See* 11 W. HOLDSWORTH, *supra* note 153, at 475–501; W. NELSON, *supra* note 172, at 136.

175. *See* L. FRIEDMAN, *supra* note 111, at 99–100; 11 W. HOLDSWORTH, *supra* note 153, at 390–94; W. NELSON, *supra* note 172, at 7.

176. *See* 11 W. HOLDSWORTH, *supra* note 153, at 462–63; 13 W. HOLDSWORTH, *supra* note 151, at 194.

177. *See* L. FRIEDMAN, *supra* note 111, at 275; Surrency, *The Development of the Appellate Function: The Pennsylvania Experience*, 20 AM. J. LEGAL HIST. 173, 191 (1976).

neutral and passive fact finder was not a radical departure, but rather the extension of trusted and traditional methods. At the same time, the adversary courts were receptive to new claims. They allowed the parties to define the issues and the evidence and, therefore, provided a forum for questions that no other institution in society would hear or resolve.

The special needs of eighteenth and nineteenth century society accentuated the adversarial aspects of Anglo-American judicial procedure. The increased number of participants in the legal process and their affiliations with different social and economic classes created a need for a demonstrably neutral mechanism. The best means to demonstrate neutrality was by using a disinterested and passive fact finder. The jury readily filled this need. Respect for the principle of neutrality made the courts a credible dispute-resolving mechanism. It also tended to make the courts an open forum to which each new social group could come seeking vindication of its rights. This tradition of openness to new claims of right has continued into the twentieth century.

The element of party control of proceedings apparent in English procedure from the earliest times was also attractive to the intensely individualistic polity of the eighteenth and nineteenth centuries.[178] The English and American judicial process made increasing allowances for each party to run his lawsuit as he saw fit, to voice his claims, and to select his evidence. The judicial decision was directly tied to the presentations of the parties. Clearly, these facts of procedure were particularly suited to an age preoccupied with the establishment of individual political and economic rights.

These tendencies toward adversarial procedure were further sharpened by the lawyers and judges who controlled the legal system. Members of the bench and bar in both England and the United States were practical men with broad worldly experience. They knew their society and shared the social and economic values it was coming to adopt. Undoubtedly, in their legal activity they attempted to respond to the needs they perceived. Further, the adversarial process was in the interest of lawyers as a group. It created more work for attorneys because increasing numbers of potential litigants availed themselves of legal advice. For all the above reasons, adversary procedure was the right procedure for the times; it did not pose a threat of radical change, but could, in a credible manner, accommodate the demands of the forces of change at work in English and American society.[179]

---

178. *See* 10 W. HOLDSWORTH, *supra* note 134, at 20–21.

179. Although it is not the purpose of this Article to address the decline of the adversary system, it should be noted that in a wide range of settings courts in the United States have abandoned previously utilized adversarial techniques. The decline of the adversary system is not a trend that began only recently but is the outgrowth of social and economic forces that have been building for a considerable length of time. The individualistic adversarial approach is, to a significant degree, inconsistent with what Max Weber has described as the fundamental requirements of modern "bureaucratic" government and industry—that official business be dispatched with "utmost speed, precision, definiteness, and continuity." M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 350 (M. Rheinstein ed. 1954). Adversarial process is slower and more individualized than a variety of other procedures. *See* Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 499–501, 525–28 (1980). These characteristics and a number of other considerations have made the adversary system a target of reformers. For a discussion of the nature of the decline of the adversary system, see *id.*

IV. Conclusion

An examination of the history of the adversary system provides a variety of insights about the values it vindicates and the reasons for its present structure. While the adversary system as a whole did not begin to coalesce until the 1700s, its component parts had been developing for centuries. What made the system come together when it did is not easy to say. However, its synthesis is clearly associated with the social and economic changes that occurred between 1700 and 1800. These changes included the rise of the modern industrial state, the acceptance of an expansive doctrine of individual liberty, and the demise of the static social tranquility that had marked both England and America in the preceding epoch. From all this, some ideas about the values served by the adversary system can be gleaned. These values include freedom from restraint on economic and political action, tolerance of change in both business and social relations, and willingness to adjudicate questions not previously considered by society.

Despite the great changes that are reflected in the rise of the adversary system, Anglo-American legal history reveals the remarkable inclination of both English and American society to preserve existing judicial institutions. Rather than fabricate new procedures, jurists and lawyers in the English-speaking world repeatedly adapted existing processes to new needs. This is strikingly apparent in the development of the jury: in the period between 1300 and 1800 the jury was transformed from an instrument of royal inquiry to a neutral and passive fact finder inclined to protect individuals from government overreaching. This significant change in objective was accomplished while jury procedure retained much of its original structure.

The tendency to preserve the existing legal machinery may have served to insulate British and American society from the worst excesses of government tyranny. Again, experience with the jury provides a convenient example. The existence of jury procedure had the effect in the thirteenth century of blocking introduction of inquisitorial methods into England. Thus, by adhering to the existing legal framework, England avoided significant reliance on the rack as a means of seeking justice.

Unwillingness to change has not always been felicitous for English and American courts. It led to excessive tolerance of delay and technicality. However, the historical lesson concerning the value of preserving traditional legal methods should not be overlooked.